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March 24, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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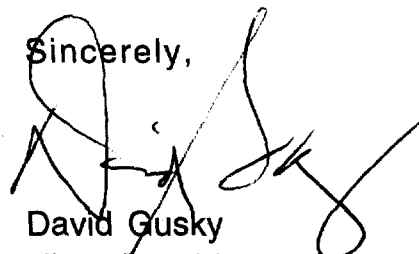
MAR 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Secretary Salas:

The attached letter was hand delivered today to Chairman Kennard and Commissioners Ness, Furchtgott-Roth, Powell and Tristani. A copy of the letter to Chairman Kennard also was hand delivered today to Wireless Telecommunications Bureau chief Dan Phythyon and WTB staff members Rosalind Allen, Steve Weingarten, Diane Conley, John Cimko, Nancy Boocker, and Jane Phillips. The letter to Chairman Kennard should be made a matter of record in the following proceedings: the Reconsideration Petition filed by the National Wireless Resellers Association in Docket No. 94-54, Interconnection and Resale Obligations of Commercial Mobile Radio Service Providers, and the Petition for Forbearance filed by the Personal Communications Industry Association (DA 97-1155). In accordance with the Commission's rules, three copies of this letter are enclosed for each proceeding.

Sincerely,



David Gusky
Vice President

Enclosures

No. of Copies rec'd
List A B C D E

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Ernest B. Kelly, III, *President*

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Ex Parte Presentation: CC Docket 94-54/& DA 97-1155

Dear Mr. Chairman:

In a March 11, 1998 letter to you, the Personal Communications Industry Association attempts to discredit certain findings from our *1997 Year End Survey of Wireless Resellers*.¹ PCIA claims that results of the survey, contrary to TRA's assertion, do not confirm the existence of a "resale blockade" in broadband PCS and SMR markets.

Despite PCIA's efforts to undermine the survey's findings (please refer to Attachment A), TRA unhesitatingly stands by the survey's credibility and does not retreat a single step from the charge that a "resale blockade" exists in broadband PCS and SMR services. The fact remains that telecommunications providers across the country (including wireless, interexchange, and local service providers) have approached the major PCS and SMR carriers in an effort to secure service for resale and no more than a small handful have been successful. We challenge anyone to show otherwise.

Indeed, PCIA's own letter implies the existence of a "resale blockade." In noting that 79.4% of survey respondents, when asked why they were not reselling PCS, checked the box stating the "PCS carrier said it did not offer a resale agreement," PCIA makes this remarkable comment: *"Not offering a resale agreement is a wholly different matter from refusing a request for resale."*

As most everyone in the telecommunications industry knows, it is impossible to run an ongoing resale operation without a resale agreement. The agreement states the rates, terms, and conditions by which a carrier will offer service to a reseller, and

¹ February 10, 1998 *ex parte* presentation. CC Docket 94-54 and DA 97-1155.

binds both parties to meet certain performance criteria to ensure the viability of the business relationship. In short, a resale agreement is the bedrock document upon which rests the reseller's entire operation. A reseller cannot exist without it.

Despite this undeniable fact of business life, PCIA, and by inference its membership, take the position that not offering a resale agreement is not the same as refusing a request for resale. While this position is pure fantasy, it certainly helps explain why resellers are having such a difficult time breaking into the PCS and SMR markets -- why there is indeed a "resale blockade." Carriers apparently believe they are under no legal obligation to offer resellers a resale agreement so long as they make their standard retail service plans nominally available for resale.

As justification for this position, PCIA cites the passage from the Commission's 1996 decision on wireless resale which states that commercial mobile radio service (CMRS) carriers are not required "to structure their offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or to establish a margin for resellers, or guarantee resellers a profit."² Not surprisingly, PCIA makes no reference to the last two sentences from the same paragraph in that decision:

"...no provider may directly or indirectly restrict resale in a manner that is unreasonable in light of the policies stated here. Under this aspect of the rule, an explicit ban on resale is unlawful, as are practices that effectively (i.e., indirectly) restrict resale, unless they are justified as reasonable."³

Perhaps no practice more effectively and unreasonably restricts resale than the refusal of a carrier to offer a resale agreement to a potential distributor. It is a blatant violation of both the letter and intent of the Commission's resale rules. As long as it is allowed to continue, scores of resellers will be denied access to the wireless industry and consumers will be denied the innovation and price competition such small businesses inevitably bring to the marketplace.

Before closing, we wish to address one further matter raised by PCIA -- the well-worn issue of "how could there be a problem when no complaints have been filed?" Toward the end of its letter, PCIA suggests that since so few complaints have been launched by resellers against PCS or SMR carriers, the overall reseller-carrier relationship must be far better than that characterized by the results of TRA's survey. But as we have

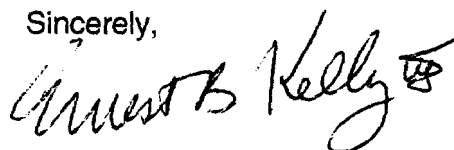
² Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd 18455, 18462 (1996), recon. pending.

³ *id.*

pointed out many times in the past, there is no correlation between the number of complaints filed by resellers against carriers and the general state of the reseller-carrier relationship. This is because, historically, resellers have been reluctant to take legal action against the very companies that provide them with critical wholesale services. Indeed, resellers form trade groups such as TRA partially as a means to pursue their legal rights collectively rather than individually.⁴

In conclusion, we again ask the Commission to act soon and decisively to help end the "resale blockade" in new wireless services. We again urge you to overturn on reconsideration the agency's decision to "sunset" the wireless resale rules in approximately five years and to forcefully deny the petition filed by PCIA to exempt PCS carriers from mandatory resale.

Sincerely,

A handwritten signature in black ink, appearing to read "Ernest B. Kelly", followed by a small square mark.

cc: Daniel Phythyon
Rosalind K. Allen
Steve Weingarten
Diane Conley
John Cimko
Nancy Boocker
Jane Phillips
Office of the Secretary

⁴ Since PCIA has raised the issue, we call your attention to one particular proceeding. On February 20, 1998, One Source Communications, Inc. filed a Petition to Deny against Nextel Communications, Inc., the nation's largest SMR carrier, arguing that its application for new SMR licenses should be denied due to its alleged failure to comply with the Commission's CMRS resale rules (FCC File No. 0000000009).

Attachment A

TRA'S RESPONSE TO PCIA'S CONCERNS REGARDING THE 1997 YEAR-END SURVEY OF WIRELESS RESELLERS

The Personal Communications Industry Association takes issue with certain results of TRA'S *1997 Year End Survey of Wireless Resellers*, claiming they are either inconsistent or misrepresent the actual findings. PCIA's claims are without merit. The survey results, unquestionably, provide an accurate overview of the current state of the wireless resale industry. The following is our response to certain survey issues raised by PCIA:

1. PCIA notes that 26.3% of respondents, all resellers, say they offer PCS services but only 10.5% report they are reselling PCS. The reason for the difference in percentages, however, is that some resellers have only obtained *agent* agreements from PCS carriers. There is a vast difference between agents and resellers.

Agents recruit subscribers on behalf of carriers and typically are paid sales commissions as compensation for their efforts. Agents almost always have an exclusive relationship with their supplying carrier, cannot offer price plans which differ from their supplying carriers, and have no equity stake in the subscribers they recruit for their supplying carrier.

Resellers, by contrast, fund their operations through their wholesale/retail margins, have nonexclusive relationships with underlying carriers (i.e., can offer customers a choice of services), attempt to offer less expensive and more innovative service plans than their underlying carriers, and have a full equity stake in the subscribers they recruit.

2. PCIA argues that our interpretation of the survey, that is, "nearly 90% of respondents who have sought to resell PCS services were denied the opportunity to do so," misrepresents the findings. Not so. Of the 38 companies that responded to the survey, four said they were not interested in reselling PCS. Of the remaining 34, four report they were reselling PCS. Thus, 30 of 34 companies (88.3%, or "nearly 90%") would like to resell PCS but have been unable to do so.

3. PCIA takes issue with our interpretation of the survey's findings regarding opportunities to resell SMR services. But the findings are fairly straightforward. While nearly half of the respondents said they would like to resell SMR services, every member of this group (100%) have been unable to do so.

PCIA also notes the difference, once again, between the percentage of survey respondents who said they are not reselling SMR services (100%) and those who said they offer SMR services (18.4%). As we noted in Item 1, the reason for the percentage difference is that some companies are indeed offering SMR services, but as an agent, not a reseller.